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No. 98-2437

Supreme Court, U.S.
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Supreme Court of the United States

NATIVE VILLAGE OF EYAK, NATIVE VILLAGE OF TATITLEK, NATIVE VILLAGE OF CHANEGA (AKA CHENEGA), NATIVE VILLAGE OF NANWALEK, AND NATIVE VILLAGE OF PORT GRAHAM,

Petitioners,

v.

WILLIAM M. DALEY, SECRETARY OF COMMERCE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONER

1. The Secretary argues that aboriginal claims as well as state claims violate federal paramountcy because of the "generally applicable principle that property interests and sovereignty in the ocean must 'coalesce and unite in the national sovereign,' " *quoting United States v. Texas*, 339 U.S. 707, 719 (1950), and that this "principle applies no matter what entity . . . asserts interests in . . . those federal areas." Respondent's Brief in Opposition (Resp. Br.) at 9. To state the argument is to refute it. The Petitioner tribes do not dispute that property and sovereignty interests coalesce in the ocean. But that was not the reason the states' claims were rejected in the paramountcy cases. They were rejected because they conflicted with the federal government's sovereign powers over foreign affairs, foreign commerce, and national defense. *United States v. Louisiana*, 339 U.S. 699, 704 (1950). Tribal aboriginal claims, unlike the states', do not conflict with such powers, but rather are consistent with, and in fact are *dependent* upon federal ownership and sovereignty. Aboriginal title *presumes* federal paramountcy. The exclusive rights to use and occupancy of an indigenous people known as aboriginal title, are by definition, only recognized under the superior ownership and sovereignty of a discovering Nation. *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543, 574 (1823); F. Cohen Handbook of Federal Indian Law 486-493 (1982). Other than by way of bald conclusions, neither the Secretary nor the lower court have ever explained how subordinate aboriginal rights, which only exist at the sufferance of Congress, can conflict with the paramount authority of the United States. And they do not. The Secretary confuses his

authority with the authority of Congress. It is Congress, not the Secretary, that determines what non-federal interests conflict with Federal Paramountcy. Congress, not the Secretary, also has exclusive and plenary authority over Indian affairs and the sole authority to determine what non-federal rights will be permitted in the OCS. Here, Congress through express legislation has protected the tribes' aboriginal rights. Thus, there is no conflict between the Tribes and Congress.

The Secretary's real argument, is that the Tribes' aboriginal rights conflict with *his* fishery regulations. But this argument assumes he has the power to allocate fishing rights in an area where aboriginal title remains unextinguished. That argument begs the question – the question is *whether* the Secretary has such power, the answer to which depends upon whether *Congress* has given him such power. As the Tribes have demonstrated, Congress has not.

2. The Secretary erroneously assumes that since both the states and the Tribes were claiming title to the Outer Continental Shelf (OCS), their claims must be equally offensive to federal paramountcy. Resp. Br. at 8. But, the *legal, fee,* or *sovereign* title claimed by the states and the right to exclusive use and occupancy, known as aboriginal title, claimed by the Tribes, are two very different forms of title. Aboriginal title is not legal title at all. Indeed, this Court has said that it is not even a "property right." *Tee-Hit-Ton Indians of Alaska v. United States,* 348 U.S. 272, 279 (1955). Rather, it is a beneficial interest which provides Tribes with the exclusive right to use and

occupy territory to which the federal government admittedly holds sovereign title, until Congress provides otherwise. The flaw in the Secretary's reliance on the Paramountcy Doctrine is demonstrated by comparing the fee title and sovereignty claims asserted by the states in the paramountcy cases and the aboriginal claims here. As this Court explained:

> The question [raised by the States in the paramountcy cases] . . . is the power of a State to *deny the paramount authority which the United States* seeks to assert over the area in question.

United States v. Louisiana, 339 U.S. at 704 (1950) (emphasis added). Plaintiffs here, do not claim legal, fee, or sovereign title such as the States asserted in the paramountcy cases, and they freely concede that the United States holds superior title interests in the OCS. Most importantly, unlike the States, the Villages do not "deny the paramount authority [of] the United States . . . over the area in question." *Louisiana*, 339 U.S. at 704.

3. The Secretary makes the circular argument that the savings provisions of the Magnuson-Stevens Fishery Conservation Act of 1976, 16 U.S.C. §§ 1854(c)(1), and 1854(a)(3), which prohibit the Secretary from implementing the Act in such a way as to conflict "with any other applicable law," could not include aboriginal fishing rights because such rights are precluded by federal paramountcy. Resp. Br. at 10-11. Under this argument, Congress could *never* protect *pre-existing* aboriginal rights in the OCS, no matter how much it so desired, because there would be no pre-existing rights to protect. As noted in the Villages' Petition at 18, 19, such a construction would

render the savings clauses in the Magnuson-Stevens Act, the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315, as well as the Outer Continental Shelf Lands Act of 1953 (OCSLA), 43 U.S.C. §§ 1331-1356[1] redundant and violate the "elementary Canon of Construction that a statute

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[1] The Savings Clause of the OCSLA, §§ 1301 *et seq.* provides that the Act shall not "affect such rights, if any, as may have been acquired under any law of the United States." 43 U.S.C. § 1342. This language is all inclusive and provides no exceptions. On its face it includes *all* rights. The Secretary, however, makes a half-hearted effort to construe this provision to exclude aboriginal rights on the ground they were not "acquired under laws of the United States," but rather from aboriginal use and occupancy. Resp. Br. at 13. This argument, at least for jurisdictional purposes, was flatly rejected by this Court in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 675 (1974) *(Oneida I); see also Oneida v. Oneida Indian Nation*, 470 U.S. 226, 229 (1985) *(Oneida II)*. Aboriginal title is based upon the doctrine of discovery which has been a part of the Common Law of the United States for over 200 years, and has been protected by the various Indian Trade and Intercourse Acts since the first was adopted by the first Congress and signed by George Washington in 1789. 25 U.S.C. § 177. The current codification was adopted in the Indian Trade and Intercourse Act of 1834. The Secretary also claims that the all-inclusive language of the OCSLA savings clause should be limited to off-shore claims under the Mineral Leasing Act. However, the "statutory language is plain, and nothing in the Act's structure or relationship to other statutes calls into question [its] plain meaning." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 552-53 (1987). Thus, there is no need to search the legislative history of OCSLA for a "possibly contrary congressional intent." *Id.* at 553 (*quoting United States v. Locke*, 471 U.S. 84, 95-96 (1985)). But in any event, the legislative history of OCSLA expressly confirms that Congress intended to protect *aboriginal* rights. *See* Pet. at 16-19.

should be interpreted so as not to render one part inoperative." *Oregon Rev. Dep't v. ACF Indus.*, 510 U.S. 332, 340-41 (1994) (*quoting Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)). Moreover, the Secretary's claim that federal paramountcy bars Congress from protecting aboriginal rights, contradicts his earlier admission that in its exercise of sovereign authority, Congress is free to protect non-federal interests in the adjacent sea, as it protected state ownership of the territorial sea under the Submerged Lands Act. Resp. Br. at 10-11.

4. In support of his argument that the decision below does not conflict with opinions of this Court or the Department of the Interior, the Secretary attempts to distinguish *Damon v. Territory of Hawaii*, 194 U.S. 154 (1904), *Carter v. Territory of Hawaii*, 200 U.S. 255 (1906), and the 1942 Opinion of the Solicitor of the Department of the Interior, *Aboriginal Fishing Rights in Alaska*, 57 Interior. Dec. 461 (1942), all of which upheld aboriginal fishing rights in ocean waters, on the ground that they involved near-shore rather than off-shore fisheries. Resp. Br. at 13. That is a distinction without a difference. All involved ocean waters. And the federal paramountcy doctrine protects near-shore as well as OCS waters. *See United States v. California*, 332 U.S. 19 (1947); *United States v. Texas*, 339 U.S. at 719. Accordingly, the Ninth Circuit's conclusion that aboriginal title is barred in ocean waters does conflict in principle with the decisions of this Court as well as the Opinion of the Interior Department.

5. The Secretary also tries to distinguish *Damon* and *Carter* on the ground that the fisheries involved there had been granted by a previous sovereign. Resp. Br. at 13. But

that is precisely what aboriginal fishing rights are. They are fishing rights that vested in sovereign tribes prior to "discovery," which are exercised by tribal members and which our federal government recognizes and will enforce unless and until Congress provides otherwise. There is no difference in principle between Hawaiian sovereignty and tribal sovereignty in so far as aboriginal fishing rights are concerned. Accordingly, tribal aboriginal fishing rights no more conflict with Federal Paramountcy than did the fishing rights granted by the previous Hawaiian sovereign.

6. The Secretary attempts to distinguish *United States v. Winans*, 198 U.S. 371, 381 (1905), and *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 678-681 (1979), on the ground that the fishing rights asserted there were based on treaties, rather than aboriginal title. Resp. Br. at 13. It is true that the specific rights the tribes sought to enforce in these cases were treaty rights. However, these treaties were in turn based upon the tribes' *pre-treaty aboriginal fishing rights*, a fact which the Court's opinions in both cases acknowledge. *Winans*, 198 U.S. at 381, 384; *Washington State Passenger Fishing Vessel Assoc.*, 443 U.S. at 678-679.

7. The Secretary maintains that the lower court's conclusion that aboriginal rights are barred in ocean waters, is consistent with this Court's holding that aboriginal title can cover "waters" as well as "lands" in *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 536, n. 4 (1987). Resp. Br. at 13. *Amoco*, however, involved aboriginal title claims to the OCS of Alaska, and, thus, it is only reasonable to conclude that the Court's reference to "waters" included OCS waters. Contrary to the Secretary, *id.*, this Court did

not merely quote the Ninth Circuit's definition of aboriginal title, this Court effectively *adopted* it:

> As explained by the Ninth Circuit, '[aboriginal title or right is a right of exclusive use and occupancy held by Natives in lands *and waters* used by them and their ancestors prior to the assertion of sovereignty over such areas by the United States.' 746 F.2d, at 574. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-69, 94 S.Ct. 772, 777-778, 39 L.Ed.2d 73 (1974); *see also* F. Cohen, Handbook of Federal Indian Law 486-493 (1982).

Id. at 536, n. 4 (emphasis added).

8. The Secretary asserts that the Villages "argue that, through legislation, Congress has in fact ceded paramountcy over the relevant areas." Resp. Br. at 10. This totally misstates the Villages' position. The Villages have never even implied, much less claimed that Congress ceded federal paramountcy over the OCS. To the contrary, the Villages maintain that it is only because Congress extended its sovereign jurisdiction and paramount authority over the OCS through the Magnuson-Stevens Act and the OCSLA, that their aboriginal rights fell under the protection of federal law. *See* Pet. at 3.

9. The Secretary suggests that because this Court's recent decision in *Alaska v. Native Village of Venetie*, 118 S.Ct. 948 (1998), holding that the Alaska Native Claims Settlement Act (ANCSA) extinguished "most Indian Country in Alaska," Indian Country cannot exist on the OCS. Resp. Br. at 9, n. 7. The Secretary is in error. *Venetie* only involved the Indian Country status of ANCSA

lands.[2] Moreover, ANCSA only extinguished Indian Country "in Alaska," which does not include the OCS. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 555 (1987); *Village of Gambell v. Hodel (Gambell III)*, 869 F.2d 1273, 1277, 1280 (9th Cir. 1989). In any event, the mere fact that some of a tribe's territory loses its Indian Country status does not mean the remainder loses such status. *See De Coteau v. District Court*, 420 U.S. 425, 446 (1975).

10. Contrary to the Secretary (Resp. Br. at 11-12), it remains the policy of the United States to protect *exclusive* hunting and fishing rights of Native Americans in ocean waters under the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1421h, the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544, and the International Whaling Convention of 1946, 62 Stat. 1716.[3]

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[2] *Venetie* did not deal with the status of the 13,492 Alaska Native allotments (9,060 certificated, 4,432 approved or pending), which cover over a million acres, and are expressly defined as Indian Country in 18 U.S.C. § 1151(c). *See Venetie*, 118 S.Ct. at 953. Nor did it deal with the estimated 3,800 restricted fee townsite lots in Alaska, which are similar to allotments and are also Indian Country, or with the 27 Native villages that own townsite lands in fee title. *See People of South Naknek v. Bristol Bay Borough*, 466 F.Supp. 870, 874-75 (D. Alaska 1979); Opinion of the Solicitor of the Department of the Interior, *Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers*, M-36975 (Jan. 11, 1993) 123, 129-30.

[3] The Secretary's suggestion that Natives do not have an exclusive right to "take" marine Mammals under the Marine Mammal Protection Act is true, but irrelevant. The relevant fact is that Natives have the *exclusive* right to "hunt" Marine Mammals under the Act. And it's worth noting the Secretary doesn't even dispute that Natives have *exclusive* rights to hunt and fish under the Endangered Species Act and International Whaling Convention.

11. The Secretary erroneously claims there is no evidence that the plaintiff Tribes ever used the OCS except for travel. Resp. Br. at 7-8, n. 5. The Secretary is mistaken. There is abundant unimpeachable evidence in the government's own reports as well as other credible sources which demonstrates that since time immemorial the Tribes have continuously and exclusively hunted and fished their traditional areas of the OCS.[4] But in any event, as the Secretary has acknowledged, the scope of the Tribes' aboriginal territories is not before this Court.

12. To sustain the lower court's ruling, the Secretary urges this Court to deny Certiorari and leave Alaska Natives subject to the Ninth Circuit's entirely new conception of aboriginal title – one that reverses two hundred years of precedent, ignores the express intent of Congress, and will destroy the way of life in over fifty Native Villages. This Court should, instead, follow its ancient and honorable precedents, give effect to the

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[4] *See, e.g.*, CR 35 Ex. 1, D.W. Clark, *Prehistory of the Pacific Eskimo Region in* SMITHSONIAN INSTITUTION HANDBOOK OF NORTH AMERICAN INDIANS (ARCTIC) 136-48 (D. Dam ed. 1984); EXXON CORPORATION, 1989 EXXON VALDEZ CULTURAL RESOURCE PROGRAM REPORT, 49-55 (1990), Exhibit 2; affidavit of Bob Henrichs, President of Native Village of Eyak, Exhibit 3.

clearly expressed intent of Congress, and grant the Tribes' Petition for a Writ of Certiorari.

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Respectfully submitted,

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